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86-2027

In The

SUPREME COURT OF THE UNITED STATES

No.

SOUTHERN FUEL COMPANY,

Petitioner,

v.

LANGHAM-HILL PETROLEUM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Benjamin Lipsitz,
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a force majeure clause contained in a contract for sale of a large quantity of fuel oil to be supplied in four consecutive monthly shipments at a specified price is available, in a summary judgment context in a diversity action, as a defense in an action for alleged breach of that contract by declining to accept the last shipment, where the clause is invoked on the premise that a cause beyond defendant's control, viz. manipulation of the world oil market by foreign oil producers, collapsed the world market and rendered defendant unable to perform or comply with the contact;

2. Whether a district court has jurisdiction to entertain a plaintiff's Rule 11 petition for attorney's fees and costs after defendant has appealed from a final judgment entered on the merits of the case;

3. Whether mere assertion of a force majeure clause contained in the contract sued upon as one of the defenses raised in an answer either violates Rule 11 or warrants imposition of sanctions thereunder.

LIST OF PARTIES

Langham-Hill Petroleum, Inc. and Southern Fuel Company were the only parties to this case in the United States Court of Appeals for the Fourth Circuit and in the United States District Court for the District of Maryland.

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Petitioner, Southern Fuel Company, ("Southern"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on March 19, 1987, in causes, consolidated there for purposes of appeal and there entitled, respectively, Langham-Hill Petroleum, Inc., Plaintiff/Appellee, v. Southern Fuels [sic] Company,

Defendant/Appellant, No. 86-1596(L) in that court, and Langham-Hill Petroleum, Inc., Plaintiff/Appellee, v. Southern Fuels [sic] Company, Defendant/Appellant, No. 86-1632 in that court. In No. 86-1596(L), the Court of Appeals affirmed a judgment of the United States District Court for the District of Maryland at Baltimore (No. R86-305) for $306,075.00 in favor of Langham-Hill Petroleum, Inc. ("Langham-Hill") in a diversity action by Langham-Hill against Southern claiming breach of a contract for sale by Langham-Hill and purchase by Southern of 25,000 barrels per month of No. 2 fuel oil at 83 cents per gallon F.O.B. Baltimore, Maryland, for the four month period from November 15-30, 1985 through February 15-28, 1986. That judgment was entered after the district court granted Langham-Hill's motion for summary judgment in its favor. Southern had accepted deliveries in November, December and

January, but had invoked a force majeure clause contained in the contract with respect to the February shipment, claiming that actions of Saudi Arabia and other foreign oil producers, which were beyond its control, had collapsed the world oil market in January, 1986 and had rendered Southern unable to comply with the agreement. In No. 86-1632, the Circuit Court affirmed an award of $5,152.95 to Langham-Hill for attorney's fees under Fed. R. Civ. P. 11, made by the district court against Southern and its attorney jointly after entry of its final judgment and after notice of appeal from that judgment. The Rule 11 sanction was imposed because Southern in its answer to Langham-Hill's complaint ahd set up the force majeure clause as one of its defenses.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ___ F.2d _____. A

copy is appended hereto. Infra, App. 2.

Southern is not aware that the "Memorandum and Order" of the district court granting Langham-Hill's motion for summary judgment is published. A copy is appended hereto. Infra, App. 17. Southern is not aware that the district court's "Memorandum and Order" of the district court imposing the Rule 11 sanction, is published. A copy is appended hereto. Infra, App. 26.

JURISDICTION

The judgment of the Court of Appeals was dated March 19, 1987 and was entered that day. A copy of the Notice of Judgment issued by that court is appended hereto. Infra, App. 1. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1) and Rules 20.2 and 20.4 of the Rules of this Court, effective June 30, 1980, as amended to January 1, 1987.

RULE OF COURT INVOLVED

Fed. R. Civ. P. 11 provides:

"Every pleading, motion, and other papers of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by orroborating circumstances is abolished. The signature of an attorney or a party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the

person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

STATEMENT OF THE CASE

On October 4, 1985, Southern and Langham-Hill entered into a written agreement under which Langham-Hill agreed to sell to Southern No. 2 fuel oil in quantites of approximately 25,000 net barrels per month at 83 cents per gallon F.O.B. Baltimore, Maryland for the four month period from November 15-30, 1985 through February 15-28, 1986. Their written agreement, set out in a printed form furnished by Langham-Hill, contained a "force majeure" clause stating in part that:

"If either party is rendered unable by force majeure, or any other cause of any kind not reasonably within its control, wholly or in opart, to perform or comply with any obligation or condition of this Agreement, upon such

> party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for a failure to perform the same during such period;
> * * *"

Southern accepted deliveries in November, December, and January. On January 24, 1986 it invoked the force majeure clause of the agreement, claiming in part that actions of Saudi Arabia and other major foreign oil producers, which were beyond its control, including "net back" arrangements with American oil refiners, who were thus furnished crude oil on a basis which guaranteed them a profit, and thereby glutted the market, had collapsed world oil prices in January, 1986 and rendered Southern unable further to perform or comply with the October 4, 1985 agreement. On January 28, 1986 Langham-Hill sued on the agreement, in a diversity action in the district court, to recover

its claimed loss on the February allotment. It ultimately claimed to be entitled to recover 29.15 cents per gallon on 25,000 barrels, or 1,050,000 gallons, of oil. Southern interposed, inter alia, the force majeure provision of the contract as a defense. After both sides filed affidavits and submitted memoranda, the district court, on April 18, 1986, granted Langham-Hill's motion for summary judgment and entered judgment in its favor for $306,075.00. On May 5, 2986, Southern appealed from that judgment.

In its Memorandum and Order granting the summary judgment, the district court noted that Langham-Hill had included in its action a claim for attorney's fees and costs. The district court commented that such items generally are not recoverable as incidental damages in a contract action and stated that it would entertain a petition for attorney's fees

and expenses under Rule 11 if counsel for Langham-Hill desired to submit one. On May 6, 1986 (after Southern had appealed from the judgment entered on May 5), counsel for Langham-Hill accepted the district court's invitation and filed a petition under Rule 11 for attorney's fees and costs. On July 29, 1986, the district court, over Southern's opposition, awarded Langham-Hill $5,152.95 "as a sanction permitted under Rule 11" (App. 28), commenting, in part, that "[i]n the instant case, the pleading filed by he defendant triggering the Rule 11 sanctions was defendant's answer which improperly raised the contract's force majeure clause as a defense. Defendant's answer was filed on March 6, 1986. Accordingly all reasonable fees and costs incurred by plaintiff after the answer was filed are properly awarded under Rule 11." (App. 27). Southern appealed from that award and its two appeals were consolidated in the Court of Appeals.

That court affirmed entry of (summary) judgment on the October 4, 1985 contract, apparently on the premise that it found the agreement in issue to be a fixed price contract under which a force majeure provision could not operate to relieve a party from what it alluded to as normal risks of price changes. It also affirmed the award of Rule 11 sanctions. In doing it so it rejected Southern's contention that the district court lost jurisdiction after Southern (prior to filing of the petition for Rule 11 sanctions) entered its appeal from the money judgment on the merits and refused to follow its earlier ruling in Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975), which held that an assessment of costs must be made while the merits are before the district court, either before an appeal, or on remand at the conclusion of an appeal. To support its declining to follow Wright it pointed

to this Court's reasoning in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), that requests for attorney's fees raised issues collateral to the main cause of action, held that it was bound by White and ruled that the district court had not abused its discretion in awarding attorney's fees under Rule 11. (It rejected Langham-Hill's request for additional sanctions under Fed. R. App. P. 38, in the form of attorney's fees and expenses on the two appeals.)

REASONS FOR ALLOWING THE WRIT

In this case the Court of Appeals decided important questions of general contract law and other questions of federal law and procedure as to the availability in a summary judgment context of the force majeure clause of a contract as a defense to a claim for alleged breach of a so-called fixed price commodities contract, as to the jurisdiction of a federal district

court to entertain a petition for Rule 11 sanctions after an appeal has been filed from a judgment on the merits and as to whether Rule 11 sanctions properly are triggered merely because a defendant files an answer asserting a force majeure defense based on a specific provision of the very contract upon which suit is brought. Southern, the defendant against whom the Court of Appeals in the instant case resolved all those issues, thus affirming the district court, suggests that the issues are important and far reaching enough to warrant their review and ultimate disposition by this Court.

The force majeure issue.

The tenor and effect of the rulings of the courts below with respect to the force majeure issue clearly are that a force majeure clause is not and cannot be available in any instance involving a fixed price contract. That clearly is what those

courts decided (that they decided it in a summary judgment context only emphasizes that circumstance) and that, Southern submits, is clearly erroneous. Despite that affidavits filed by Southern raised factual issues, or supported inferences competing with Langham-Hill's assertions, the lower courts ignored elements that ordinarily would easily suffice to defeat summary judgment and simply concluded that because a fall in world oil prices was also produced by the same causes as Southern relied upon in invoking the contractual force majeure clause which it raised as a defense, those events, despite the plain language of the contract, cannot as a matter of law constitute force majeure occurrences because the contract clause cannot as a matter of law be taken as allowing or contemplating a price decline as a factor invoking its operation. But that totally avoids the real issue,

established in this instance by the record presented on the motion for summary judgment, viz. whether in fact the events on which Southern seeks to rest its force majeure defense in fact were beyond its control and in fact rendered it unable to perform or comply, See, for example, Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1539-44 (5th Cir. 1984); Kerr-McGee Group v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972), holding that force majeure issues are issues of fact. See also the opinion (later withdrawn, Continental Oil v. Crutcher, 465 F.Supp. 118, 120 (D.C. La. 1979), as having been rendered unnecessary by a subsequent stipulation entered into by the parties involved) in Continental Oil Company v. Crutcher, 434 F.Supp. 464 (D.C. La. 1977), clearly expressing the position that a drastic price change can qualify as a force majeure event (under a force

majeure clause in a contract for purchase of natural gas, the clause providing, as does the one in the instant case, that force majeure includes not only events specified in the contract, but also other causes of whatever kind not reeasonably with the control of the party seeking to invoke the clause). The issue involved, potentially affecting a broad spectrum of national and international trade, is, Southern suggests, pervasive and important enough to warrant this Court's attention.

The Rule 11 sanctions issue.

This case presents a serious issue as to the jurisdiction vel non of a district court to deal with a Rule 11 petition after an appeal has been filed from a judgment on the merits and while that appeal is pending. The Court of Appeals declined to follow its long-standing and respected decision in Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975),

apparently in deference to what it considered to be this Court's reasoning in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), that requests for attorney's fees present issues collateral to the merits or the main cause of action (and hence apparently should be able to be dealt with by a district court during the pendency of an appeal from a judgment determining the main cause of action). But the Court of Appeals also acknowledges that it has never dealt with that precise jurisdictional question (although, it remarked, it has adopted White in other, similar contexts, and notes that it is bound by this Court's reasoning in White (which was not a Rule 11 case, but arose under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C., Sec. 1988 and turned on distinguishing motions for fees from motions to alter or amend judgments.)

Southern suggests that the issue is important enough, especially perhaps in view of the seemingly increasing tendency to seek Rule 11 sanctions, to be finally and definitively resolved by this Court for the guidance of federal courts in the future.

With respect to application vel non of Rule 11 to specific circumstances, Southern believes that this case, in which such sanctions were applied simply because it had the temerity to file an answer asserting a defense which it considered was available to it under the facts of its situation and from the face of the very contract on which it was sued, is an example of as thin a situation as one reasonably can expect to encounter in a Rule 11 context. (What the district court suggested and the Court of Appeals upheld was that Southern and its lawyer were supposed to just give up, simply to submit

and not in any manner to resist Langham-Hill's claim. Southern suggests that its counsel, at least, might more likely have been engaging in sanctionable conduct had he not filed an answer and had he not raised in that answer all defenses, incliding force majeure, then available to it.) The willingness of litigants and their attorneys to assert and advance available defenses, whether or not they ultimately prove to be successful, and the freedom to raise such defenses free from fear of sanctions should they fail, is too fundamental to our concept of adversarial civil justice to be chilled or otherwise trammelled by the prospect of awards of monetary or other sanctions circumstances other than where patent and flagrant abuse is demonstrated. Cf. Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984). This case, Southern submits, is not such a one. The result reached below

should not be allowed to remain uncorrected. The case should not be permitted to become a boundary delineating an area within which Rule 11 sanctions will be imposed. The parameters involved should be determined and designated by this Court, so that all concerned may know with some reasonable certainty where they may safely tread.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN LIPSITZ,
Attorney for Petitioner

Baltimore, Maryland

June 17, 1987

APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 19, 1987

TO: David Michael Kopstein, Esq.
Berryl Alan Speert, Esq.
Benjamin Lipsitz, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date

in Case Number(s): 86-1596
86-1632

The Court's opinion is enclosed.

* * * * *

JOHN M. GREACEN
CLERK

App. 2

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1956(L)

Langham-Hill Petroleum Inc.,

Plaintiff/Appellee,

versus

Southern Fuels Company,

Defendant/Appellant.

No. 86-1632

Langham-Hill Petroleum, Inc.

Plaintiff/Appellee,

versus

Southern Fuels Company,

Defendant/Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (C/A No. 86-305-R).

Argued: November 13, 1986

Decided: MArch 19, 1987

Before WIDENER and CHAPMAN, Circuit Judges and ROBERT E. MAXWELL, United States Districy Judge, sitting by designation.

Benjamin Lipsitz on brief for Appellant; David Michael Kopstein (DiSalle and Staudinger on brief) for Appellee.

CHAPMAN, Circuit Judge:

Southern Fuel Company (Southern) appeals an order of summary judgment against it for breach of an oil purchase contract and from an award of attorneys fees under Fed. R. Civ. P. 11 which award was granted after notice of intent to appeal the summary judgment order had been filed. Southern's primary contention, which the Court rejects, is that the action of Saudi Arabia, which led to a dramatic drop in world oil prices, falls within the scope of the contract's force

majeure or Act of God clause, thereby validating Southern's refusal to honor the contract. Southern also questions the jurisdiction of the district court to award attorney's fees under Fed. R. Civ. P. 11 after notice of appeal has been filed. We find that the court does retain such jurisdiction.

I.

Southern and Langham-Hill Petroleum, Inc., (Langham-Hill) are both in the business of buying and selling large quantities of pertoleum products. In October, 1985, the parties entered into a fixed price contract under which Southern agreed to purchase 100,000 barrels (4,200,000 gallons) of No. 2 Fuel oil in four monthly installments. The contract states that the price of the oil was $0.83 per gallon. The dispute is centered upon paragraph 7 of the agreement of sale, a force majeure clause written in boilerplate

language. 1/

1/ This clause states: If either party is rendered unable by force majeure, or any other cause of any kind not reasonably within its control, wholly or in part, to perform or comply with any obligation or condition of this Agreement, upon such party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided obligations to make payments then due for products delivered hereunder shall not be suspended. The cause of the suspension (other than strikes or differences with workmen) shall be remedied as far as possible with reasonable dispatch. Settlement of strikes or Cont. differences with workmen shall be wholly within the discretion of the party having the difficulty. The party having the difficulty shall notify he other party of any change in circumstances giving rise to the suspension of its performance and of its resumption of performance under this Agreement. The term "force majeure" shall include, without limitation by the following enumeration, acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority, civil or military.

The first three monthly shipments of oil were purchased by Southern as agreed. In January of 1986, the price of crude oil in the world market collapsed as a result of Saudi Arabian attempts to regain its share of the world oil market. In a letter dated January 14, 1986, Southern informed Langham-Hill that bsed upon the drop in world oil prices caused by the Saudi Arabians, who were "outside Southern's control," Southern was invoking the force majeure lause and would not perform the remainder of its obligations under the contract.

Langham-Hill, invoking the district court's diversity jurisdiction, alleged a cause of action for breach of contract. The district court granted Langham-Hill's motion for summary judgment holding that the fall of oil prices in the world market did not relieve Southern Oil from its obligations under the contract.

The court found the measure of damages under U.C.C. [sec.] 2-708(1) to be the difference between the market price at the time and place of expected tender and the unpaid contract price. This formula yields $306,075.00 in actual damages. The district court also stated that it was willing to entertain a petition by Langham-Hill for attorney's fees and costs pursuant to Fed. R. Civ. P. 11. Southern appealed. The day after Southern filed its notice of intent to appeal, Langham-Hill filed a petition for attorney's fees and costs pursuant to Fed. R. Civ. P. 11. The district court awarded attorney's fees to Langham-Hill. Southern also appealed this ruling and the issues were consolidated into one appeal.

II.

A grant of summary judgment is appropriate only when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a

matter of law. Any doubts as to the existence of a genuine issue of material fact will be resolved against the movant, in this case, Langham-Hill. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

Southern argues that questions of fact exist regarding its helplessness in the face of Saudi Arabian action and its inability to remain in business if it had satisfied the contract. Despite our sympathy for its plight, the law of contracts and the realities of the business world lead us to reject Southern's contentions.

This court has previously expressed some opposition to efforts by a party to a contract to characterize an act which results in price fluctuations as being outside its control, thereby rendering the contract unenforceable. "'Shortage of cash or inability to buy at a remunerative price' cannot be regarded 'as

a contingency beyond the seller's control.'" Wheeling Valley Coal Corporation v. Mead, 186 F.2d 219 (4th Cir. 1980). If fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated. Recently the Seventh Circuit in Northern Indiana Public Service Company v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986), dealt with a utility company's effort to escape a long-term, fixed-price coal contract through a declaratory judgment action. The court rejected the utility company's argument that a regulatory body's denial of a proposed rate increase makes the contract prohibitively expensive. The majority reasoned that:

> [the defendant] committed itself to paying a price at or above a fixed minimum and to taking a fixed quantity

> at that price. It was willing to make that commitment to secure an assured supply of low sulphur coal, but the risk it took was that the market price of coal or substitute fuels would fall. A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed price contract is to allocate risks in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.

799 F.2d at 275. We agree with this reasoning and reject Southern's appeal.

Southern also contends that summary judgment was inappropriate in this case because it did not receive an opportunity to be heard on the summary judgment motion. There is no absolute requirement that a ruling on a motion for summary judgment be preceded by a hearing and, given the evidence presented, the

district court did not err in deciding the motion without a hearing. See Atkinson v. Bass, 579 F.2d 865 (4th Cir. 1978).

III.

Finally, Southern argues that the district court erred in its award of attorney's fees to Langham-Hill. Under Fed. R. Civ. P. 11, the district court is empowered to render attorneys and represented parties responsible for reasonable fees incurred by other parties in response to arguments that are neither supported by fact nor warranted by existing law. Ruling on this motion after its final judgment and after notice of appeal had been filed by Southern, the district court found that Southern's use of the force majeure clause of the contract was an attempt to extricate itself from an unprofitable contract that was neither supported by fact nor warranted by existing law. The court found that Fed. Rule Civ.

p. 11 had been violated and held Southern and its attorney to be jointly and severally liable to Langham-Hill for $5,152.95 in attorney's fees.

Southern contend that the award of attorney's fees was improper because the district court does not retain jurisdiction of a case after a notice of appeal is filed. Southern argues that this court is bound by Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975) which held that an assessment of costs must be made while the merits are before the district court, either prior to an appeal, or on remand after the questions of appeal have been settled.

Sine the Wright opinion, the Supreme Court has considered this issue. In White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), the court ruled that a request for attorney's fees under the Civil Rights

Attorney's Fees Award Act of 1974, 42 U.S.C. [sec.] 1988 was valid four and one-half months after a consent decree was approved and a judgment entered by the district court. The court reasoned that the request for attorney's fees raised issues collateral to the main cause of action. Attorney's fees are not compensation for the injury giving rise to the action and thus are not an element of relief. 455 U.S. at 452. Furthermore, as the court in White pointed out, were we to rule otherwise, litigants would request attorney's fees in every motion they argued out of fear that the motion would become the final judgment of the case thus precluding later requests. 455 U.S. at 453. The discretion of the trial judge will support denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party. Piece-meal appeals will be avoided

if district courts promptly hear and decide claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits. See 455 U.S. at 454.

Although this court has never dealt with this precise jurisdictional question, it has adopted White in other, similar, circumstances. See Bernstein v. Menard, 728 F.2d 252 (4th Cir. 1984) (judgment was final before defendant sought attorney's fees and, therefore, plaintiff's appeal, filed within thirty days of fee award, but more than thirty days after the order of dismissal, was invalid because it was not timely). This court is bound by the Supreme Court's reasoning in White. Since this issue has never previously been clearly decided by this court, we feel that the appeal, on the whole, does not warrant impositionn of sanctions under Fed. R. App.

p. 38 and, therefore, Langham-Hill's request for additional sanctions is denied.

Southern alternatively argues that attorneys fees are not merited in this case. This court will ordinarily give deference to the imposition of Rule 11 sanctions by a district court and will disturb such sanctions only if there has been an abuse of discretion. Stevens v. Lawyers Mutual Liability Insurance Company of North Carolina, 789 F.2d 1056 (4th Cir. 1986). Given the great weight of authority in opposition to Southern's assertion of the force majeure clause as a defense, we hold that the district court did not abuse its discretion in awarding attorney's fees under Rule 11.

The decision and order of the district court is therefore

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LANGHAM-HILL PETROLEUM, INC.:

Plaintiff :

v. : CIVIL ACTION

NO. R-86-305

:

SOUTHERN FUEL COMPANY

:

Defendant :

: : oØo : :

MEMORANDUM AND ORDER

Plaintiff and defendant are both in the business of buying and selling large quantities of petroleum products including fuel oil. In October, 1985, the parties entered into a fixed price contract under which the defendant agreed to purchase from plaintiff a total of 100,000 barrels (4,200,000 gallons) of No. 2 fuel oil (home heating oil) in four monthly installments. The last installment was to be purchased by defendant during the second half of February, 1966, ay the price of $0.83 per

gallon. (See plaintiff's Attachment A to Exhibit A.)

The first three monthly deliveries of oil were purchased by defendant as agreed. In January, 1986, the price of crude oil on the world market collapsed as a result of Saudi Arabia's attempt to regain its share of the world oil market. Defendant soon thereafter informed plaintiff that it was invoking the contract's force majeure clause and accordingly would not perform its remaining obligations under the contract.

Plaintiff invokes this court's diversity jurisdiction alleging breach of contract. Before the Court is plaintiff's motion for summary judgment. Defendant has opposed and both plaintiff and defendant have filed supplemental memoranda in reply. The issues are thoroughly briefed and the Court now rules pursuant to Local Rule 6 (D. Md. 1985) without need for a

hearing.

A grant of a motion for summary judgment is appropriate only when "there is no genuine dispute as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; National Constructors Ass'n. v. National Contractors Ass'n., Inc., 498 F.Supp. 510, 520 (D. Md. 1980), modified on other grounds, 678 F.2d 942 (4th Cir. 1982). In addition there should be "no disagreement as to the inferences which may be drawn from the undisputed facts." Steinberg v. Elkins, 470 F.Supp.1024, 1030 (D. Md. 1979). The burden is on the moving party and any doubts as to the existence of a genuine issue of material fact will be resolved against movant. See Adikes v. S.H. Kress & Co., 398 U.S. 144 (1970). The Court is satisfied that the issue to be resolved is one of law and not of fact and that decision under Rule 56 is appropriate.

Defendant's letter dated January 14, 1986 informed plaintiffs that it was invoking the force majeure clause of the contract because of "the collapse of oil prices." (See plaintiff's memorandum in support of motion for summary judgment Exhibit A, Attachment B). The letter further stated that the actions of Saudi Arabia and other major foreign producers depressing the prices of world oil rendered defendants "unable to perform or comply with the provisions of the [contract]." Id.

The force majeure clause of the contract permits either party to suspend its obligations under the contract when conditions beyond its control renders the party unable to comply with the terms of the contract. (See plaintiffs memorandum in support of motion for summary judgment Exhibit A, Attachment B)

a party to invoke the force majeure clause include:

> Acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil, or public disturbance, or any act or omission byond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations, or acts of any government or governmental body or authority, civil, or military.

It is clear that the fall in world oil prices thereby making it less profitable for the defendant to purchase the oil is not contemplated by the force majeure clause as a condition enabling defendant to repudiate the contract. Furthermore, defendant has not alleged, nor can it allege, that the actions of Saudi Arabia or of any other foreign oil producer has rendered it unable to purchase the last installment of oil under the contract.

The attempts of buyers to repudiate their contracts with sellers

after a fall in market price of a product have been treated by the courts with little favor. In Hancock Paper Co. v. Champion International Corp., 424 F.Supp. 285 (E.D. Pa. 1976) aff'd, 565 F.2d 151 (3rd Cir. 1977) a buyer attempted to invoke the defenses of "supervening impossibility" and "commercial impracticability" when the market price polycoated waste paper 1 became depressed because of other sales made by the seller. The trial court granted defendant's motion for summary judgment holding that "the fact Hancock did not profit from its contract with Champion does not render its performance impossible." 424 F.Supp. at 290. The Court noted that the comments to [sec.] 2-615 specifically bar consideration of a decline in market price as a commercial impractcability since that is the exact type of risk which fixed price business contracts are intended to cover. Id.

citing Comment 4 to UCC [sec.] 2-615.

This Court finds that the fall of oil prices on the world market does not relieve defendant from its obligations under the contract. Accordingly, plaintiff is entitled to recover damages resulting from defendant's breach as a matter of law. A seller's damages when a buyer repudiates the contract is the difference between the market price at the time and place tender and the unpaid contract price. U.C.C. [sec.] 2-708(1). In the instant case, the contract price as time of tender was $0.83 per gallon and the market price for No. 2 oil at the time was $0.5385 per gallon (See Memorandum in support of plaintiffs motion for summary judgment, Exhibit A (affidavit of W.E. Travis) and attachment C to Exhibit A (Platt's Oilgram). The difference between contract

1/ Polycoated waste paper is used in the manufacture of milk cartons.

price and market price at the time and place of tender, therefore, was $0.2915 per gallon. Defendant was obligated under the contract to purchase 1,050,000 gallons of oil from plaintiff in February. Multiplying 1,050,000 gallons by $0.2915 per gallon produces a contract damages figure of $306,075.

Plaintiff has also moved for attorneys' fees and costs. As a general rule, attorney fees and expenses incurred by a party in an action for breach of contract are non recoverable as incidental damages. However the Court will entertain a petition for attorneys' fees and costs pursuant to Rule 11 of the Federal Rules of Civil Procedure should counsel for plaintiff desire to submit such a petition.

Accordingly, for the reasons stated herein, it is this 18th day of April, 1986, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiff's motion for summary judgment is hereby GRANTED.

2. That plaintiff have judgment in its favor and against defendant Southern Fuel Company in the amount of $306,075, plus interest at the legal rate from February 28, 1986; and

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/Norman P. ramsey
Norman P. Ramsey
United States DistrictJudge

IN THE UNITED 6TATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LANGHAM-HILL PETROLEUM, INC.,:

Plaintiff :

v. : CIVIL ACTION
NO. R-86-3Ø5

SOUTHERN FUEL COMPANY :

Defendant :

: : oØo : :

MEMORANDUM AND ORDER

The instant action arose after defendant Southern Fuel Company ("Southern") repudiated its contract to purchase No. 2 fuel oil from plaintiff when the price of crude oil on the world market collapsed. On April 18, 1986, this Court entered summary judgment in favor of the plaintiff and against the defendant and held that it would entertain a petition by plaintiff for attorneys' fees and costs pursuant to Rule 11 of the Federl Rules of Civil Procedure. Plaintiff shortly thereafter filed its petition for attorneys' fees and costs. By Memorandum and Order dated June 1Ø, 1986, this Court

granted plaintiff's petition and requested plaintiff to supplement its motion with a summary of hours and charges accrued in handling the matter after the improper assertion by the defendant of the force majeure clause as defense. Presently before the Court is plaintiff's supplment to its petition for attorneys' fees and costs.

Rule 11 renders attorneys and the represented parties responsible for reasonable fees and costs incurred by the other parties in responding to the pleadings. In the instant case, the pleading filed by defendant triggering the Rule 11 sanctions was defendant's answer which improperly raised the contract's force majeure clause as a defense. Defendant's answer was filed on March 6, 1986. Accordingly all reasonable fees and costs incurred by plaintiff after the answer was filed are properly awarded under

Rule 11. For services rendered after the answer was filed and up to the time of summary judgment plaintiff incurred attorneys' fees of $4,127.50 for services from the law firm of DiSalle and Staudinger and 575.00 for services from the law firm of Frank, Bernstein, Conaway & Goldman. The costs incurred by plaintiff during that period were $55.81 from DiSalle and Staudinger and $394.64 from Frank, Bernstein, Conaway & Goldman. The Court finds that these are reasonable fees and costs and accordingly, will award plaintiff the amount of $5,152.95 as a sanction permitted under Rule 11. /1 The defendant Southern Fuel and its attorney shall be

/1 Plaintiff's petition for fees and costs was not filed in response to defendant's answer. Accordingly, an award for the fees incurred in preparing the petition is not appropriate under Rule 11.

jointly and severably [sic] liable to plaintiff for that amount.

For the reasons stated herein, it is this 29th day of July, 1986, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiff's petition for attorney's fees and costs pursuant to Fed.R.Civ.P. 11 is GRANTED in the amount of $5,152.95.

2. That defendant Southern Fuel Company and its attorney are jointly and severably [sic] liable to plaintiff for that amount; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
Norman P. RAmsey
United States District Judge

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN FUEL COMPANY,

Petitioner,

v.

LANGHAM-HILL PETROLEUM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a buyer under a fixed price contract for goods may be excused from his purchase obligation on grounds of *force majeure* where an intervening decline in the market price of the goods renders the contract unprofitable for him.

2. Whether a district court may award attorney's fees as a sanction under F.R.Civ.P. 11 after an appeal on the merits has been noticed where the award is made in time for the two appeals to be consolidated.

3. Whether raising the affirmative defense of *force majeure* in circumstances where it previously has been held to be inapplicable warrants the imposition of sanctions under F.R.Civ.P. 11.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-2027

SOUTHERN FUEL COMPANY,

Petitioner,

v.

LANGHAM-HILL PETROLEUM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3) is reported at 813 F.2d 1327. The opinions and decisions of the district court (Pet. App. 16, 25) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1987. The petition for a writ of certiorari was filed on June 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner and respondent[1] entered into a fixed price forward contract under which petitioner was to purchase fuel oil from respondent in four monthly batches. The contract contained a *force majeure* clause. When petitioner's sole remaining obligation was to accept delivery of and pay for the final batch of fuel oil, petitioner, relying on the *force majeure* clause, refused to do so, claiming that certain actions of Saudi Arabia which were beyond petitioner's control had decreased the market price of fuel oil, thereby rendering petitioner unable to pay for the last batch.

Respondent promptly brought a diversity action against petitioner for breach of contract. In its answer, petitioner raised the *force majeure* defense. Respondent then moved for summary judgment and petitioner argued that the *force majeure* defense presented a triable issue of fact.

The district court ruled that the *force majeure* clause could not be construed as relieving petitioner of its purchase obligation because of a decline in market prices. The court granted the summary judgment motion and awarded damages in an undisputed amount. In its opinion, the district court invited respondent to apply for attorney's fees under F.R.Civ.P. 11, which respondent did. The fees were awarded after petitioner had filed its notice of appeal from the summary judgment decision, but in time for the appeal of the fee award to be consolidated with the pending appeal of the summary judgment decision.

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[1] In accordance with Rule 28.1 of the rules of this Court, respondent hereby states that it has no parent companies, subsidiaries or affiliates.

Both the summary judgment decision and the fee award were affirmed. The court of appeals recognized that the unavailability of *force majeure* in these circumstances was a matter of well-settled law, in the Fourth Circuit and elsewhere, and held that, consequently, the district court had properly granted summary judgment and had not abused its discretion in making the fee award.

On appeal, petitioner also argued that the filing of its notice of appeal from the summary judgment decision had divested the district court of jurisdiction to consider the Rule 11 fee petition. The court of appeals rejected this contention, relying upon this Court's decision in *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) and analogous precedent in the Fourth Circuit.

ARGUMENT

1. *The court of appeals acted properly in summarily rejecting the force majeure defense.* "Garden variety" issues of contract law seldom warrant the attention of this Court, particularly where, as here, the issues are uniformly treated among the states and implicate no important federal concern.

The district court and the court of appeals, in granting and affirming summary judgment for respondent, enforced the well-settled principle that the fundamental purpose of a fixed-price forward contract is to allocate the risk of intervening market price fluctuations. *Northern Indiana Public Service Company* v. *Carbon County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986); *Hancock Paper Co.* v. *Champion International Corp.*, 424 F.Supp. 285, 290 (E.D. Pa.

1976); *aff'd*, 565 F.2d 151 (3d Cir. 1977). The presence of a *force majeure* clause does not alter this principle. *Northern Indiana Public Service Company*, *supra*; *Monolith Portland Cement Company* v. *Douglas Oil Company of California*, 303 F.2d 176, 180 (9th Cir. 1962); *Wheeling Valley Coal Corporation* v. *Mead*, 186 F.2d 219 (4th Cir. 1950).

In this regard, the decisions of the district court and the court of appeals were entirely consistent with published decisions of every court to address this subject, including prior case law in the Fourth Circuit.[2]

2. *The district court's retention of jurisdiction to impose sanctions under Rule 11 was in accordance with established law.* In recognizing the jurisdiction of the district court to award attorney's fees subsequent to the filing of petitioner's notice of appeal, the Fourth Circuit brought itself into line with every other court of appeals which has considered this issue. *Masalosalo by Masalosalo* v. *Stonewall Ins. Co.*, 718 F.2d 955, 956-57 (9th Cir. 1983); *Overnite Transportation Co.* v. *Chicago Industrial Tire Co.*, 697 F.2d 789, 793 (7th Cir. 1983); *West v. Keve*, 721 F.2d 91, 95 n.5 (3d Cir. 1983); *Rothenberg* v. *Security Management Co., Inc.*, 677 F.2d 64 (11th Cir. 1982); *Obin* v. *District No. 9 of the International Association of Machinists & Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981). This position also has been specifically

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[2] Petitioner relies exclusively upon the subsequently withdrawn opinion of the district court in *Continental Oil Co.* v. *Crutcher*, 434 F.Supp. 464 (E.D. La. 1977), a case involving a long-term gas supply contract not governed by the Uniform Commercial Code. That decision was legally erroneous and, in any event, factually distinguishable. Compare, *Publicker Industries, Inc.* v. *Union Carbide Corp.*, 17 UCCRS 989 (E.D. Pa. 1975).

applied to Rule 11 sanctions. *In Re Itel Securities Litigation*, 791 F.2d 672 (9th Cir. 1986). There exists no conflict requiring resolution by this Court.

This position is well supported by common sense. This Court has indicated that lower courts should adopt policies which "will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits." *White* v. *New Hampshire Department of Employment Security, supra*, 455 U.S. at 454. Here, the district court's fee award was made in time to permit the appeal of that decision to be consolidated with the pending appeal of the summary judgment decision. Vacating the fee award on jurisdictional grounds would have forced the district court to engage in the pointless exercise of re-issuing the fee award following the disposition of the appeal on the merits, precluding consolidation of the two appeals.

Petitioner asserts that the court of appeals erred in determining the jurisdictional question before it, but sets forth no rationale to support a contrary result.

3. *The district court clearly had discretion to impose sanctions under Rule 11.* Effective in 1983, this Court approved an amendment to F.R.Civ.P. 11 under which counsel signing pleadings are thereby deemed to certify, with respect to each position taken therein:

> . . . that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .

District courts have been given considerable leeway in determining whether Rule 11 has been violated. The question presented to the Fourth Circuit was whether the district court had *abused its discretion* in awarding respondent attorney's fees attributable to petitioner's invocation of the defense of *force majeure* in circumstances where neither the law nor the facts furnished any support for such a defense. 813 F.2d at 1331.

The court of appeals upheld the fee award based on "the great weight of authority in opposition to [petitioner's] assertion of the *force majeure* defense. . . ." 813 F.2d at 1331. Both courts below found that the application of *force majeure* to the facts of this case would have contradicted all existing precedent, including clear precedent in the Fourth Circuit. Moreover, petitioner could not, and did not, offer any reasonable basis for departing from that precedent. The clear irrationality of excusing a party from a fixed-price purchase obligation because of decline in market prices allows no room for reasonable debate. Indeed, until its counsel was forced to admit otherwise during oral argument before the Fourth Circuit, petitioner attempted to argue that its invocation of *force majeure* was prompted by the alleged actions of Saudi Arabia rather than by the effect of those actions on the market price of fuel oil.

Petitioner's suggestion in this Court that, when confronted with a complaint to which no reasonable defense is available, defense counsel should nonetheless be permitted, with impunity, to raise a frivolous defense, undermines the very policies Rule 11 is intended to serve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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